IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7562 OF 2006

Smt Kantibai Pandharinath Patil & Ors. ...Petitioners

Versus

Smt Rakhmabai Ramchandra Patil & Ors. ...Respondents

Shri A.K.Abhyankar, Sr counsel i/by Shri R.D.Suryawanshi for the Petitioners.
Shri Rahul Kate for the Respondent Nos.1 to 3.
Shri S.G.Karandikar for Respondent Nos.4,6,8 and 9 to 12.
Shri R.S.Apte alongwith Shri A.A.Garge for the Respondent No.14.
Shri Shreehari Aney, Sr counsel alongwith Ms Deepali Bhalekar, Manik Joshi and S.H.Merchant i/by M/s M and M Legal Venture for the Respondent No.15.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 23, 2007.

P.C.:

1. Heard the learned senior counsel appearing for the Petitioners, the learned senior counsel appearing for the fifteenth Respondent and learned counsel appearing for the rest of the Respondents. The Petitioners are the original Plaintiffs. The Petitioners filed a suit for declaration that the oral partition of the suit properties alleged to have been effected in the year 1983 in respect of the properties described in paragraph No.6 and 8 of the plaint is false and fraudulent and the same is against the provisions of

law. In the suit a prayer is also made for partition and separate possession. The Petitioners are claiming to have one fourth share in the suit properties. An application for temporary injunction was made in the suit restraining the Respondents from creating any third party interests and a prayer was also made for restraining the fourteenth Respondent from granting permission to develop the said properties.

2. The learned trial Judge rejected the Application for temporary injunction. Appeal preferred by the Petitioners has been dismissed.

3. The learned senior counsel appearing for the Petitioners pointed out that the prayer for temporary injunction has been rejected by the courts below only on the ground that Mutation Entry No.129 has been challenged by the Petitioners. He invited my attention to the finding recorded by the Appellate Court that in view of the Mutation Entry the Petitioners were estopped from challenging the fact that partition has not been effected. He pointed out that the Mutation Entry on which reliance has been placed has been made in the year 1983. He pointed out the present ages of the second to

fourth Petitioners and submitted that it was obvious that even assuming that there was an alleged partition, the same will not bind the share of the second to fourth Petitioners. He submitted that in a substantive suit for declaration and partition, the relief of preventing the Respondents from creating the third party interests ought to have been granted.

4. The learned counsel appearing for the contesting Respondents submitted that the Mutation Entry No.129 effected in the year 1983 has been acted upon by the parties. He submitted that Mutation Entry has been made on the basis of intimation given by the predecessor of the present Petitioners. He pointed out that on the basis of the Mutation Entry, the other members of the family filed returns under section 6 of the Urban Land (Ceiling and Regulation) Act, 1976. He submitted that there is prima facie material on record to show that the parties have all along acted on the basis of the Mutation Entry and only when some property was sought to be developed in the year 2005, the suit has been belatedly filed. The learned senior counsel appearing for the fifteenth Respondent has invited my attention to the reply filed by the said Respondent. He submitted

that no interference is called for.

5. I have considered the submissions. Both the courts below have found that a Mutation Entry recording partition of the suit properties was made in the year 1983 at the instance of the husband of the first Petitioner i.e the father of the second to fourth Petitioners. The finding is that there is a prima facie material on record to show that the parties have acted upon the Mutation Entry. It is pointed out that some of the Defendants filed returns under the said Act of 1976. It was sought to be contended that second to fourth Petitioners were born in 1975, 1979 and 1981 respectively and therefore, on the date of the alleged partition, they were minors.

6. The fact remains that the Mutation Entry regarding partition has been made in the year 1983 at the instance of the father of second to fourth Petitioners. There is a prima facie finding recorded that the parties have acted upon the partition which is recorded in the Mutation Entry. Both the courts below have therefore come to the conclusion that the Petitioners failed to make out a prima facie case.

There is no perversity or illegality in the concurrent orders passed by the courts below. It must be, however, stated that the suit is yet to be decided on merits and the trial court will have to record a finding regarding the existence of the alleged partition after parties lead oral and documentary evidence. Prayer in the suit is for partition and separate possession. Therefore, it is necessary to clarify that all further transactions in respect of the suit properties by the Respondents herein will be subject to final outcome of the suit. It is necessary to direct the Respondent Nos.1 to 13 and 15 herein to file undertaking with the trial court stating therein that as and when they create third party interests in respect of of the suit property or in the buildings constructed thereon or in respect of any part of the buildings they will give an intimation in writing of the pendency of the suit to the prospective purchasers.

7. Hence, I pass the following order:

(i) The impugned Judgments and Orders are confirmed.

(ii) It is made clear that all further transactions

which may be made by the Respondents (save and except Respondent No.14) will be subject to final outcome of the suit.

(iii) The aforesaid Respondents will file an undertaking in the trial Court on or before 04th June, 2007 stating therein that if they propose to create any third party interests in respect of the suit properties or building/s constructed thereon, they will give a notice in writing of the pendency of the suit to the prospective purchasers.

(iv) If undertakings as aforesaid are not filed by the concerned Respondents within the stipulated time, it will be open for the Petitioners to apply for appropriate relief before this Court.

(v) All contentions of the parties in the pending suit are expressly kept open.

(vi) Hearing of the suit is expedited and learned trial Judge will give priority to the hearing of the suit.

(vii) Writ Petition is disposed of.

JUDGE